LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 119

JAMES IVEY WYATT,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S OPENING BRIEF

A. L. WIRIN
257 South Spring Street
Los Angeles 12, California
Attorneys for Petitioner

J. HUBERT FARMER
GERALD L. ROSEN
Of Counsel

INDEX

TOPICAL INDEX

	Page
PETITIONER'S OPENING BRIEF	1
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Rules Involved	2
Statement	3
Summary of Argument	5
Argument	6
I. The Common Law Rule, Recently Reaffirmed by this Court, Allows Either Spouse to Assert the Privilege of the Exclusion of Adverse Testimony by the Other; and this Rule Is Dispositive of the Case at Bar	6
A. The General Rule—Marital Privilege	6
B. The Necessity Exception	8
II. There Is No Necessity for an Exception to the General Rule of Privilege Where the "Victim" and Defendant Married After the Offense	10
III. The Reason for the Necessity Exception Fails Where the Wife Refuses to Testify	13
IV. The Evidence Introduced by the United States Did Not Corroborate the Petitioner's Admission of Transportation	15
Conclusion	16

TABLE OF AUTHORITIES CITED

CASES:

	Page
Bentley v. *Cooke*, 3 Doug. 422	9
Cohen v. *United States*, 214 F. 23	13
Denning v. *United States*, 247 Fed. 463	13
Hawkins v. *United States*, 358 U.S. 74	6,7
Hayes v. *United States*, 168 F. 2d 996	13
Lambert v. *California*, 355 U.S. 226	11
Levine v. *United States*, 163 F. 2d 992	13
Lord Audley's Case, 3 How. State Trials 401	9
Miller v. *State*, 37 Tex. Cr. R. 575, 40 S.W. 313	11
Norman v. *State*, 127 Tenn. 340, 155 S.W. 135	11
Norvell v. *State*, 149 Tex. Cr. R. 213, 193 S.W. 2d 200	11
Pappas v. *United States*, 241 F. 665	13
People v. *Curiale*, 137 Cal. 534, 70 Pac. 468	11
People v. *Johnson*, 9 Cal. App. 233, 98 Pac. 510	11
People v. *Schoonmaker*, 117 Mich. 190, 75 N.W. 439	11
Shores v. *United States*, 174 F. 2d 838	3, 14
State v. *Evans*, 138 Mo. 116, 39 S.W. 462	11
State v. *McGinty*, 14 Wash. 2d 71, 126 P. 2d 1086	11
State v. *McKay*, 122 Iowa 658, 98 N.W. 510	11
Stein v. *Bowman*, 13 Pet. 209	9
United States v. *Williams*, 55 F. Supp. 375	12
United States v. *Bozeman*, 236 Fed. 432	13
United States v. *Gwynne*, 209 F. 993	11, 12
United States v. *Rispoli*, 189 F. 271	8, 13
United States v. *Mitchell*, 137 F. 2d 1006	7, 8, 13
Yoder v. *United States*, 80 F. 2d 665	6

STATUTES AND MISCELLANEOUS:

Rule 26, Federal Rules of Criminal Procedure	2, 5, 7
18 U.S.C. 2421	2, 3, 15
28 U.S.C. 1254(1)	1
Wigmore (on Evidence) §2239	8, 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 119

JAMES IVEY WYATT,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S OPENING BRIEF

Opinion Below

The opinion of the Court of Appeals (R. 47-58) is reported in 263 F. 2d 304 and modified at 263 F. 2d 311.

Jurisdiction

The judgment of the Court of Appeals was entered on January 14, 1959 (R. 58-59). The judgment was modified and the petition for rehearing was denied on February 18, 1959 (R. 61). The petition for a writ of certiorari was filed on March 19, 1959, and granted on June 15, 1959, 360 U.S. 908. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether a woman transported in interstate commerce for immoral purposes by a person whom she subsequently married, and to whom she was married at time of trial, may be compelled to testify against him, in the face of her assertion of the marital privilege.

2. Whether the Petitioner's admissions of interstate transportation were sufficiently corroborated.

Statutes and Rules Involved

1. The pertinent part of 18 U.S.C. 2421 provides:

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; . . ."

2. Rule 26, Federal Rules of Criminal Procedure provides:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Statement

Petitioner was convicted of transporting Mary Kathleen Byrd in violation of the Mann Act, 18 U.S.C. 2421 (R. 42). The United States Court of Appeals for the Fifth Circuit affirmed the conviction (R. 58).

The Government called "Mary Kathleen Byrd" (R. 22) who stated her name was "Mary K. Wyatt". She refused to testify, asserting marital privilege, and her "objection" was "overruled" (R. 23). She offered to show the Court her marriage license, and the Court refused to look at it, saying "it does not make any difference in a White Slave . . . case," citing *Shores* v. *United States,* 174 F. 2d 838.

The Court of Appeals took the view that the marital privilege was inapplicable, because of an exception to the privilege that applies where the wife had been injured by the husband. It cited many, so-called, "white slave" cases where the privilege was held inapplicable. Petitioner claims the authorities relied on were not in point and that both the trial and appellate courts fell into the same error.

There was evidence that Petitioner and Mary Kathleen Byrd were not married until after the Mann Act offense (R. 23 and 32).

Petitioner moved to exclude the wife's testimony (R. 30).

The transportation element of the offense was proved by admissions of the defendant (R. 32) and corroborated by the witness' spouse (R. 23).

The evidence adduced at the trial showed that petitioner was arrested by a Dothan City detective, Henry W. Hilson, on December 13, 1957, for a violation of the city code (R. 16). In the ensuing search, Hilson found that petitioner had two stubs of bus tickets from Columbus, Georgia, and

that he "was going to Laguna Beach to see Mrs. Byrd's mother and he was just stopped over in Dothan" (R. 19).

A bellboy at the Martin Hotel in Dothan identified Mary Kathleen Byrd as being in the room with petitioner (R. 3, 6). During one of the bellboy's calls to the room, petitioner asked him how business was and the bellboy said "What kind of business?" Petitioner responded "We are working, and if you get anything, to let us know" (R. 7). Mrs. Byrd then said, "You haven't had any business?" and the bellboy replied, "Yes'm, I had two this morning but I have turned them down" (R. 7).

Petitioner told the bellboy during another call, "We are going out for awhile, and if you have any business to be sure to hold it for us; we will be back after a little while" (R. 8). At a later visit petitioner, in Mrs. Byrd's presence, told the bellboy that they would divide fairly and "If business increases, we will do better, we will split fifty fifty" (R. 9). Still later, Mrs. Byrd said to the bellboy in the presence of petitioner, "How about the business, there ain't no business" (R. 11).

Mrs. Byrd then testified that she came to Dothan on the bus with petitioner, but that she paid for her ticket which he purchased (R. 23-24). Thereafter, the court allowed the government to cross-examine Mrs. Byrd because she was "so obviously antagonistic" (R. 26). Mrs. Byrd testified that she gave a statement to the F.B.I. which admitted that after she rode from Columbus, Georgia, to Dothan, she registered at the Martin Hotel with petitioner as "Mr. and Mrs. James Wyatt" (R. 26). The statement further said that after a few minutes in petitioner's room she left for the Houston Hotel (also in Dothan) where she registered as "Mary K. Byrd" (R. 27). She denied any conversation with the bellboy at the Martin Hotel as to "business" (R. 27-28).

An F.B.I. Agent testified that in two separate interviews petitioner stated that he had purchased the bus tickets; that he and Mrs. Byrd had left Georgia together and had spent the night together at the Hotel Martin in Dothan; that they were going to Laguna Beach to see his mother-in-law; and that the next afternoon, after they had a quarrel about petitioner's drinking, she had left (R. 32). Petitioner first told the agent that he was married to Mary Kathleen Byrd on November 15, 1957 (R. 31), but later said that he was not married to her when the trip took place in December, 1957 (R. 32).

Summary of Argument

It must be pointed out that there are no cases either federal or state which are exactly in point. There are many cases which deal with the privilege of the wife to refuse to testify against her husband as to his acts against her during the marriage, and many cases which deal with the wife testifying against her husband as to acts against her which occurred before the marriage. But it appears that no case like the case at bar has arisen where the wife has been compelled to testify against her husband with respect to acts which occurred before the marriage. Here there is a double reason to exclude the testimony. First, because the privilege of the wife not to testify was violated; and secondly, because the right of the husband to bar the testimony of the wife as to acts which occurred before the marriage, was violated.

These two rules are well recognized at common law and are today the majority rules in both federal and state courts. The United States seeks to have this Court decide that neither of these rules should be continued under the power granted to this Court by Rule 26, Federal Rules of Criminal Procedure.

Finally, a necessary element of the crime was lacking, namely the transportation. in that there was insufficient evidence to corroborate the admission of the petitioner.

ARGUMENT

I

The Common Law Rule, Recently Reaffirmed by This Court, Allows Either Spouse to Assert the Privilege of the Exclusion of Adverse Testimony by the Other; and This Rule Is Dispositive of the Case at Bar.

A. The General Rule—Marital Privilege.

At the October 1958 Term this Court unanimously[1] reversed a judgment because of the erroneous admission of testimony by one spouse against the other. *Hawkins* v. *United States*, 358 U.S. 74. The Court relied on the established common law privilege allowing one spouse to bar the testimony of the other. Although the common law privilege has existed for several centuries its vitality in the federal courts had not always been certain,[2] but any doubts, seem to the petitioner to have been resolved in favor of retention of the rule, by the unequivocal language and holding in *Hawkins*:

> "While the rule forbidding testimony of one spouse *for* the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband . . . was a belief that such policy was necessary to foster

[1] Mr. Justice Stewart wrote a separate concurring opinion.

[2] See *Yoder* v. *United States*, 80 F. 2d 665, where the privilege was abrogated.

> family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. *Such a belief has never been unreasonable and is not now. . . .*" (last emphasis added) (p. 77)

Petitioner comes within the rule since both he and his wife attempted to claim the privilege when the wife's testimony was offered by the Government.[3] The Government in *Hawkins* asked this Court to modify the common law rule so the privilege would belong to the witness' spouse only. This Court correctly rejected the Government's view, agreeing with most of the cases which have dealt with the privilege problem,[4] and stated the privilege is that of either spouse. On the facts in this case, the operation of the privilege would be proper even in the view of those who would limit its scope, since *both* spouses claimed the privilege; indeed, it would be in accord with the position of the Solicitor General in *Hawkins, supra.*

This Court said in *Hawkins* (at p. 77) that it would follow the common law unless reason and experience dictated otherwise. Thus, the Court showed how it would apply Rule 26 of the Federal Rules of Criminal Procedure in questions involving common law privileges. The analysis is, then: (1) What was the rule at common law? (2) Is the rule reasonable? (3) What does our experience suggest with reference to the rule in question? The touchstone for the Court, as it should be, is the rule at common law.

There has been no showing that the general rule so recently reaffirmed should now be abandoned. Therefore, there is no issue in this case unless the Government can

---

[3] R. 22 and R. 30.

[4] e.g., *United States* v. *Mitchell*, 137 F. 2d 1006, 1008, where the Second Circuit said ". . . clearly the better view is that the privilege is that of either spouse who chooses to claim it." Wigmore, 8, §2241.

bring the facts of this case within the exception to the general marital privilege.

B. The Necessity Exception.

The trial court and the Court of Appeals held the testimony of the wife was properly admitted in this case because of an exception to the general rule.[5] The exception is sometimes called the "Necessity Exception"; the rationale of which is, that it would be unjust to allow the husband to wrong his wife and then seal her lips at the trial.[6] Since the witness spouse was the woman who was transported in violation of the Mann Act, the courts below *assumed* the necessity exception was applicable; but these courts failed to consider two salient facts distinguishing this case from those relied on: (1) The wife in this case *refused* to testify; and (2) The defendant and witness spouse were *not* husband and wife at the time the alleged offense occurred. Thus, there is no basis for the necessity exception in this case.

Wigmore at §2239 in v. 8 states:

> "The common law did not fail to recognize that the rule of privilege was subject to some sort of exception. That exception was commonly placed on the ground of *Necessity*, that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon undeviating enforcement of the rule."[7]

---

[5] See such cases as *United States* v. *Rispoli*, 189 F. 271, and *United States* v. *Mitchell*, 137 F. 2d 1006.

[6] 8 Wigmore on Evidence, §2239.

[7] The material quoted from Wigmore is well laced with critical comments about the privilege and the scope of the exception; however, Wigmore is being cited only for his exposition of the rule. His writings show an extreme antagonism towards the marital

He cites Lord Mansfield in *Bentley* v. *Cooke*, 3 Doug. 422:

> "That necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where for instance the wife would otherwise be exposed without remedy to personal injury."

This Court recognized the "necessity exception" at an early date, stating the general rule does not apply "where the husband commits an offense against the person of his wife." *Stein* v. *Bowman*, 13 Pet. 209, 221. Probably no discussion of the necessity rule would be complete without some kind of passing reference to *Lord Audley's Case*, House of Lords, 1631, 3 How. State Trials, 401.

The critical thing about the necessity exception is the *reason* underlying it: Where the general rule would have the effect of allowing a wrong-doing husband to seal his victim's lips, a necessity arises for the relaxation of the general rule of privilege. Obviously, where there is no "necessity" there should be no exception to the general rule.

---

privilege, and for that matter towards the privilege against self incrimination. See §2251 where in speaking of that privilege he says: "As a bequest of the 1600s, it is but a relic of controversies and convulsions which have long ceased." His influence has been strong, and this may, in part, explain the number of critical law review comments undermining the marital privilege.

II

There Is No Necessity for an Exception to the General Rule of Privilege Where the "Victim" and Defendant Married After the Offense.

The necessity exception has no meaningful application where the victim and defendant marry *after* the offense. The rationale of the privilege, i.e., marital harmony, suggests the privilege ought to be respected in a case like this. Here there is no fear that the defendant may arbitrarily seal his wife's lips, and thus leave her without legal redress. Assuming a valid marriage, she has made a free choice, and hence she is not that helpless victim for whom the exception was made.

In this case the record is equivocal about the date of the marriage. The main reason for uncertainty is the ruling of the trial judge. The wife offered to show the Court her marriage license to which the Court responded: ". . . I am not interested in seeing it, it does not make any difference in a White Slave . . . case . . ." (R. 23).

The indictment would suggest the witness and defendant were *not married* at the time of the alleged offense, since it identifies the defendant as "James Ivy Wyatt" and the woman being transported as "Mary Kathleen Byrd" (R. 1). When called as a witness at the trial she gave her name as Mary K. Wyatt (R. 22).

The testimony of a government witness would suggest no marriage until after the offense (R. 32).

Indeed the court below assumed that the witness and defendant were not married at the time of the acts in question, but were married at the time of trial (R. 57). Further this point was considered by the court in denying point 10 in the Petition for Rehearing (R. 60).

Assuming the validity of the principle, of no necessity where the marriage occurs after the offense, then these doubts should be resolved in favor of the petitioner.[8] *Lambert* v. *California*, 355 U.S. 226, 227.

The Common Law rule is that the necessity exception does not apply where the offense to the wife occurred prior to the marriage.

Almost all of the cases dealing with the necessity exception where the offense to the witness spouse occurred before the marriage hold the exception is not applicable. *United States* v. *Gwynne* (1914 D.C.), 209 F. 993; *Norvell* v. *State*, 149 Tex. Cr. R. 213, 193 S.W. 2d 200 (1946); *People* v. *Curiale*, 137 Cal. 534, 70 Pac. 468 (1902); *State* v. *McKay*, 122 Iowa 658, 98 N.W. 510 (1916); *People* v. *Schoonmaker*, 117 Mich. 190, 75 N.W. 439 (1898); *State* v. *Frey*, 76 Minn. 526, 79 N.W. 518 (1899); *Norman* v. *State*, 127 Tenn. 340, 155 S.W. 135 (1913); and *State* v. *Evans*, 138 Mo. 116, 39 S.W. 462 (1897) (all cases wherein a rape prosecution based upon testimony of the wife as to acts which occurred before the marriage, and excluded in the interest of public policy to preserve marital harmony); *Miller* v. *State*, 37 Tex. Cr. R. 575, 40 S.W. 313 (1897) (prosecution for performing an abortion); *People* v. *Johnson*, 9 Cal. App. 233, 98 Pac. 510 (1908) (assault to commit murder); *State* v. *McGinty*, 14 Wash. 2d 71, 126 P. 2d 1086 (1942) (prosecution against the husband for living with a common prostitute).[9]

Most of these cases stem from interpretation of statutes which have codified the common law; but interestingly enough none of the States has amended its statutes in light

---

[8] Apparently the Court of Appeals assumed the marriage occurred after the offense (R. 57).

[9] For additional authorities in this field see Wigmore, §2239, note 10, and an annotation in 76 A.L.R. 1088.

of these decisions. This would indicate experience and reason do *not* dictate the need for a change in the common law rule.

There have been two cases in the Federal District Courts where the offense to the wife occurred before the marriage: *United States* v. *Gwynne*, 209 F. 993 (D.C. E.D. Pa.); *United States* v. *Williams*, 55 F. Supp. 375 (D.C. Minn.). These cases were Mann Act prosecutions.

In *Gwynne* the Court said,

> "It is apparent that the exception to the rule of privilege prohibiting husband or wife from testifying against each other applies only to injuries inflicted or threatened during the existence of the marriage . . . The ground of the relaxation of the rule is the necessity for the protection of the wife . . ."

Williams, under the necessity exception, allowed the wife to testify. On principle *Gwynne* is correct and *Williams* is indefensible; because once the common law privilege is accepted, then the exception can only be applicable where there is a true necessity, i.e., allowing the victim to testify in vindication of his or her rights, in spite of the privilege. There is no reason to extend the common law exception where the petitioner and the witness were *not* married when the offense occurred; and *are* married, at the time of the prosecution.

III

The Reason for the Necessity Exception Fails Where the Wife Refuses to Testify

The witness spouse refused to testify:

> "Witness: I have here in my possession my marriage license that I would like to present to the Court, and I refuse to testify in this case against my husband.
> Court: All right. Is that your ground for refusing?
> Witness: That is my ground for refusing.
> Court: Your objection is overruled." (R. 23)

The necessity exception was created to prevent the husband from sealing the wife's lips, and hence is inapplicable where the witness wife claims the privilege.

The question of the marital privilege has arisen in several appellate cases under the Mann Act, and the necessity exception has generally been applied[10] allowing the wife to testify.[11] However, none of these cases appears to involve a situation where the *wife* claimed the privilege, i.e., she *refused* to testify, and the cases typically speak of the wife's *right* to testify: ". . . and in circumstances such as here presented, we think it would be shocking to deny her the right to testify." *United States* v. *Mitchell*, 137 F. 2d 1006, 1008. The *Mitchell* case, decided in the Second Circuit provides a good example of the rationale of these cases:

> "This is the famous exception for Necessity, in the case of injuries to the spouse, stated in 1631 in Lord

---

[10] The one exception: *Johnson* v. *United States*, 221 Fed. 250.

[11] *United States* v. *Rispoli*, 189 Fed. 271; *Cohen* v. *United States*, 214 Fed. 23; *United States* v. *Bozeman*, 236 Fed. 432; *Pappas* v. *United States*, 241 Fed. 665; *Denning* v. *United States*, 247 Fed. 463; *United States* v. *Mitchell*, 137 Fed. 2d 1006; *Levine* v. *United States*, 163 F. 2d 992; *Hayes* v. *United States*, 168 F. 2d 996.

> Audley's Case, Hut. 115, 2 How. St. Tr. 401, where the husband had instigated rape against his wife. The exception itself is well settled; the only question at all doubtful is whether it can be properly applied to a violation of the White Slave Traffic Act. Here the argument is made that this is not a crime against the person of the wife, but a crime against interstate commerce. But, as Wigmore, id. §2239, says generally of all cases of enticing to prostitution or white slav traffic involving the wife, 'of course morally it is a shameless offense against the wifehood'; and we agree, as do all the authorities, with a single exception, which deal with the specific question under this statute."

All of the Mann Act appellate cases would be reconcilable with the principle being urged here with the possible exception of *Shores* v. *United States,* 174 F. 2d 838, where the Court by way of express obiter dictum said the wife may be compelled to testify.[12] Therefore, none of the appellate cases prior to this one supports the holding being questioned in this proceeding. Rather, the correct application of principles of these cases requires a reversal in this case. To hold here that a spouse may be *compelled* to testify, runs counter to the common law.

---

[12] *Shores* v. *United States,* 174 F. 2d 838, 841.

IV

The Evidence Introduced by the United States Did Not Corroborate the Petitioner's Admission of Transportation

The rule is now well settled by *Opper* v. *United States*, 348 U.S. 84 and *Smith* v. *United States*, 348 U.S. 147, that an admission is not admissible, unless there is other evidence to corroborate and establish the trustworthiness of the statement.

Here the admission of the petitioner was introduced to establish the element of transportation, necessary in a prosecution under 18 U.S.C. 2421. The only other evidence as to transportation was the two bus ticket stubs and the statements made by the petitioner's wife. As it has been illustrated above, the statements and testimony of the wife were objected to by both the petitioner and his wife; consequently they should not have been admitted into evidence. Therefore, the only admissible evidence of the transportation was the two bus ticket stubs.

The stipulation of the parties (R. 63) reveals that there is no indication as to who used the stubs, or any detached portion thereof, or indeed, that they were used at all. Therefore, it is difficult to fathom how these two stubs establish or tend to establish the trustworthiness of the statements made by petitioner. Standing alone, these two bus ticket stubs, do not corroborate the petitioner's admission of transportation; therefore, the testimony was inadmissible. Manifestly, this Court ought to reverse a conviction based upon evidence which lacks an essential element of the crime.

CONCLUSION

It is respectfully submitted that the common law (privilege and exception) should be reaffirmed, and that the judgment be reversed.

Respectfully submitted,

A. L. Wirin
Attorneys for Petitioner

J. Hubert Farmer
Gerald L. Rosen
Of Counsel